Public Prosecutor v Nomezam Apandy bin Abu Hassan (No 2)

HIGH COURT (MELAKA) — CRIMINAL TRIAL NO 45–5 OF 2003
LOW HOP BING J
3 OCTOBER 2007

Criminal Procedure — Accomplice — Whether witness was an accomplice — Active v passive role played by witness, effect on evidence — Whether consideration of facts and circumstances of each case necessary in order to determine whether witness an accomplice

Criminal Procedure — Prosecution — Prima facie case — Duty of trial judge at the close of prosecution's case — Whether to subject prosecution evidence to a maximum evaluation — Whether burden on prosecution to prove its case beyond reasonable doubt at close of its case

Criminal Law — Penal Code — s 302 — Murder — Ingredients of — Mens rea, how determined — Whether mens rea capable of being determined by direct evidence — Whether mens rea may be determined by indirect evidence — Whether necessary to consideration facts and circumstances in each case to establish mens rea

Evidence — Accomplice — Evidence of — Presumption against credibility unless corroborated on material particulars — Whether rebuttable presumption — Evidence Act 1950 s 114 (b)

Evidence — Accomplice — Whether witness was accomplice — Active v passive role played by witness, effect on evidence — Whether consideration of facts and circumstances of each case necessary in order to determine whether witness an accomplice

Evidence — Corroboration — Nature of — Corroboration required as a matter of practice against corroboration required as a matter of law — Whether similar test

Evidence — Dying declaration — Admissibility — Whether dying declaration admissible in both civil and criminal cases — Whether admissible when maker

of dying declaration not under an expectation of death — Whether circumstances of the transaction resulting in maker's death must have some proximate relation to the actual occurrence — Whether transaction must relate to facts pertaining to death of the maker — Evidence Act 1950 s 32(1)(a)

Evidence — Hearsay — Exception — Dying declaration — Admissibility — Statement made to witness by victim dying in hospital — Whether such statement admissible — Evidence Act 1950 s 32(1)(a)

The accused was charged with murder punishable under s 302 of the Penal Code. The facts revealed that the deceased victim was romantically involved with the ex-girlfriend of the accused. The victim was killed in a vicious manner — the accused took the victim hostage in his own car, tied his wrists to the steering wheel, emptied a can of petrol over him and then set him ablaze. The victim died in hospital some four days after he had been set ablaze, from severe burns with external and internal injuries. SP3 — a friend of the accused who was with the accused at the material time and witnessed the entire commission of the crime gave direct evidence against the accused. Apart from other evidence, the victim himself, whilst dying at the hospital told his father ('SP5') that he had been robbed and gave details of the registration number of the motorcycle ridden by the accused at the material time. The victim also informed his younger brother ('SP11') how the crime against him had been committed. The High Court found that the prosecution had established a prima facie case, and called upon the accused to enter his defence.

Held, convicting the accused as charged and sentencing him to death:

(1) In a criminal case, at the end of the prosecution's case, the trial judge must determine as a trier of fact, whether the prosecution has made out a prima facie case. He must subject the prosecution evidence to a maximum evaluation. There is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. This is in line with s 180(1) of the Criminal Procedure Code ('CPC') (see para 4); *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 followed.

(2) In order to establish a prima facie case of murder, it is incumbent on the prosecution to prove: (i) the death of the deceased; (ii) the deceased's death was caused by injury or injuries inflicted on the deceased; (iii) the accused had caused the injury or injuries which resulted in the deceased's death; and (iv) the act causing the death was committed with

A the mens rea under s 300(a), (b), (c) or (d). *Public Prosecutor v Brahim b Rais* [1999] MLJU 305;*Pendakwa Raya lwn Soo Tai Leng* [2005] 7 MLJ 363 and *Public Prosecutor v Norazam bin Ibrahim* [2006] 3 AMR 524 referred. In the instant case, applying a maximum evaluation of the prosecution's evidence, the High Court found that the prosecution had
B established: (a) the death of the victim; (b) that the victim died from the injuries inflicted upon him; (c) it was the accused who had poured petrol over the victim and used a burning newspaper to set the victim ablaze, thereby causing extensive burn injuries to the victim who died
C as a result; and (d) the intention of the accused to cause bodily injury to the victim could be gathered from the act or acts of the accused (see paras 3, 6, 35 & 38).

(3) Mens rea in the sense of intention or knowledge being a mental element
D is not capable of being established by way of direct evidence. It has to be gathered by way of indirect evidence, taking into consideration all the facts and circumstances prevailing in each particular case. In the instant case, the accused had acted with complete callousness. The risk he had taken was such that he knew the ultimate effect of his acts were
E so imminently dangerous and would in all probability cause death, or such bodily injury as is likely to cause death. His acts were necessarily fatal and carried knowledge of the consequences. The acts of the accused were done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in
F the ordinary course of nature to cause death. The prosecution had accordingly established the necessary mens rea, ie the intention prescribed in s 300(a), (b) or (c) or the knowledge contained in s 300(d) of the Penal Code (see paras 38, 42, 44 & 46); *State of Madhya Pradesh v Ram Prasad* AIR [1968] SC 881; *PP v Kenneth Fook Mun Lee (No 2)*
G [2003] 3 MLJ 581 and *Bandarupalli Ventakeswarlu* [1975] SCC (Cri) 84 referred.

(4) In Malaysia, a person is an accomplice if he is a *participes criminis* — has participated in the commission of an offence. Where he had played an
H active role, his evidence must be corroborated. If his role was passive, his evidence may be accepted with the usual corroboration warning. The particular facts and circumstances of each case play a pivotal part in resolving the issue of whether a witness is an accomplice. In the instant case, SP3 was not an accessory after the fact. He did not play an
I active role in the crime. He was not a *participes criminis* and was not in law an accomplice. SP3's evidence should thus be treated as the evidence of an ordinary witness, requiring no corroboration (see paras 49, 51 & 53); *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593 distinguished; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ

211; *Re Soo Leot* [1956] MLJ 54 and *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 referred.

(5) Alternatively, if SP3 was indeed an accomplice, s 114(b) of the Evidence Act 1950 would raise a rebuttable presumption that his evidence was unworthy of credit unless corroborated on material particulars. In the instant case, the evidence of the prosecution witnesses and the tendered exhibits connected the accused with the crime. There was therefore sufficient corroboration of SP3's evidence (see paras 56–57 & 76); *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71; *Haji Ismail bin Mat Sa'at v Public Prosecutor* [1955] 1 MLJ 94 and *Chua Sin Teng & Ors v Public Prosecutor* [1963] MLJ 150 referred; *Lee Choh Pet & Ors v Public Prosecutor (No 2)* [1972] 1 MLJ 187 and *R v Baskerville* [1916] 2 KB 658 followed.

(6) In the event that High Court judge had erred in his alternative finding that SP3 was an accomplice necessitating his evidence being corroborated, the judge would warn himself of the danger of acting on the uncorroborated evidence of SP3. In this regard, the judge was convinced of SP3's credibility and the truth of his evidence which had undergone incisive cross-examination. His evidence remained unscathed and consistent with the other evidence adduced and exhibits tendered by the prosecution. There was no reason for SP3 to lie and the judge could find no plausible ground to reject his evidence (see para 77).

(7) The statements that the victim made to his father (SP5) and younger brother (SP11) constituted 'dying declarations' — relevant and admissible under s 32(1)(a) of the Evidence Act 1950. Section 32(1)(a) allows the admissibility of a dying declaration in criminal as well as civil cases, whether the person who made it was or was not, at the time when he made it, under an expectation of death. Under s 32(1)(a) the circumstances of the transaction which resulted in the maker's death must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the maker such as the time or place of his death or about meeting someone who caused the maker's death (see paras 68, 70, 73–74); *Pakala Narayana Swami v King-Emperor* [1939] 8 MLJ 59 referred.

(8) Concerning the defence, it was abundantly clear to the High Court that the accused sought to shift his criminal responsibility to SP3. The evidence of the accused also constituted a bare denial without any other proof. It had not reasonably dislodged the prosecution's case. It was therefore the High Court's specific finding that the accused failed to cast a reasonable doubt on the prosecution's case. The alternative

submission by the defence based on the absence of mens rea was also devoid of merits (see paras 89, 92–94).

(9) The prosecution had proved beyond reasonable doubt the charge of murder under s 302 of the Penal Code against the accused. Accordingly the accused was convicted thereon and the mandatory sentence of death imposed (see paras 95 & 97).

Per curiam/Observation:

Corroboration consists of independent testimony connecting, tending to connect or implicating the accused with the crime. The test for corroboration is the same whether the corroboration is required as a matter of practice under common law or mandatorily under statute. The nature of corroboration also varies according to the particular circumstances of the offences charged (see para 60); *Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401, pp 418-419 referred and *R v Baskerville* [1916] 2 KB 658 followed.

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana membunuh dan boleh dihukum di bawah s 302 Kanun Keseksaan. Fakta-fakta menunjukkan bahawa mangsa yang meninggal dunia sedang bercinta dengan bekas kekasih tertuduh. Mangsa telah dibunuh dengan kejam — tertuduh telah menahan mangsa sebagai tebusan dalam keretanya sendiri, mengikat lengannya kepada stereng kereta, mengosongkan satu tin petrol ke atasnya dan kemudian membakarnya. Mangsa meninggal dunia di hospital empat hari kemudian setelah dibakar, akibat terbakar teruk dengan kecederaan luaran dan dalaman. SP3 — kawan tertuduh yang bersama tertuduh pada masa matan dan menyaksikan keseluruhan perbuatan jenayah telah memberikan keterangan langsung terhadap tertuduh. Selain daripada keterangan lain, mangsa sendiri, semasa tenat di hospital memberitahu bapanya (SP5) bahawa beliau telah dirompak dan memberikan butiran nombor pendaftaran motosikal yang ditunggang oleh tertuduh pada masa matan. Mangsa juga telah memberitahu adik lelakinya (SP11) bagaimana jenayah ke atasnya dilakukan. Mahkamah Tinggi mendapati bahawa pihak pendakwaan telah membuktikan satu kes prima facie, dan memanggil tertuduh untuk memasukkan pembelaannya.

Diputuskan, mensabitkan tertuduh seperti yang dituduh dan menjatuhkan hukuman mati ke atasnya:

(1) Dalam satu kes jenayah, di akhir kes pendakwaan, hakim perbicaraan hendaklah menentukan sebagai pengadil awal fakta, sama ada pihak pendakwaan telah menunjukkan satu kes prima facie. Beliau hendaklah

meletakkan keterangan pendakwaan kepada penilaian maksimum. Tiada beban ke atas pihak pendakwaan untuk membuktikan kesnya melampaui keraguan munasabah di penutup kes pendakwaan. Ini sejajar dengan s 180(1) Kanun Acara Jenayah ('KAJ') (lihat perenggan 4); *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 dan *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 diikut.

(2) Bagi tujuan untuk membuktikan satu kes prima facie pembunuhan, adalah wajib untuk pihak pendakwaan membuktikan: (i) kematian si mati; (ii) kematian si mati adalah disebabkan oleh kecederaan atau kecederaan-kecederaan yang disebabkan ke atas si mati; (iii) tertuduh telah menyebabkan kecederaan atau kecederaan-kecederaan yang membawa kepada kematian si mati; dan (iv) tindakan menyebabkan kematian dilakukan dengan mens rea di bawah s 300(a), (b), (c) atau (d). *Public Prosecutor v Brahim b Rais* [1999] MLJU 305;*Pendakwa Raya lwn Soo Tai Leng* [2005] 7 MLJ 363 dan *Public Prosecutor v Norazam bin Ibrahim* [2006] 3 AMR 524 dirujuk. Dalam kes semasa, dengan menggunakan penilaian maksimum terhadap keterangan pendakwaan, Mahkamah Tinggi mendapati bahawa pihak pendakwaan telah membuktikan: (a) kematian mangsa; (b) bahawa mangsa meninggal dunia akibat kecederaan yang dikenakan ke atasnya; (c) tertuduhlah yang telah menuang petrol ke atas mangsa dan menggunakan surat khabar yang terbakar untuk membakar mangsa, yang mengakibatkan kecederaan luka terbakar teruk ke atas mangsa yang meninggal dunia akibatnya; dan (d) niat tertuduh untuk menyebabkan kecederaan tubuh terhadap mangsa boleh disimpulkan daripada tindakan atau tindakan-tindakan tertuduh (lihat perenggan 3, 6, 35 & 38).

(3) Mens rea dalam bentuk niat atau pengetahuan suatu elemen mental tidak boleh dibuktikan melalui keterangan langsung. Ia boleh disimpulkan melalui keterangan tidak langsung, dengan mengambilkira semua fakta dan keadaan yang wujud dalam setiap kes tertentu. Dalam kes semasa, tertuduh telah bertindak dengan tanpa perasaan langsung. Risiko yang beliau ambil adalah suatu yang mana beliau mengetahui bahawa kesan langsung tindakan-tindakannya amat berbahaya dan kemungkinan besar akan menyebabkan kematian, atau kecederaan ke atas tubuh yang mungkin akan menyebabkan kematian. Tindakan-tindakannya adalah memudaratkan dan mengetahui tentang akibatnya. Tindakan-tindakan tertuduh dilakukan dengan niat menyebabkan kecederaan kepada tubuh si mati dan kecederaan kepada tubuh yang diniatkan untuk dikenakan adalah mencukupi secara kebiasaannya untuk menyebabkan kematian. Pihak pendakwaan dengan itu telah membuktikan mens rea yang sewajarnya, iaitu niat yang ditetapkan dalam s 300(a), (b) atau (c) atau pengetahuan yang terkandung dalam s 300(d) Kanun Keseksaan (lihat perenggan 38, 42,

44 & 46); *State of Madhya Pradesh v Ram Prasad* AIR [1968] SC 881; *PP v Kenneth Fook Mun Lee (No 2)* [2003] 3 MLJ 581 dan *Bandarupalli Ventakeswarlu* [1975] SCC (Cri) 84 dirujuk.

(4) Di Malaysia, seseorang itu adalah rakan sejenayah yang bersubahat jika beliau adalah participes criminis — terlibat dalam perlakuan suatu kesalahan. Jika beliau memainkan peranan aktif, keterangan beliau hendaklah disokong. Jika peranannya pasif, keterangannya boleh diterima dengan amaran sokongan biasa. Fakta-fakta dan keadaan tertentu setiap kes memainkan peranan penting dalam menyelesaikan isu sama ada seorang saksi merupakan rakan sejenayah. Dalam kes semasa, SP3 bukan peserta selepas fakta tersebut. Beliau tidak memainkan peranan aktif dalam jenayah itu,. Beliau bukan participes criminis dan daripada segi undang-undang bukan rakan sejenayah. Keterangan SP3 patut dianggap sebagai keterangan saksi biasa, yang tidak memerlukan sokongan (lihat perenggan 49, 51 & 53); *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593 dibeza; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; *Re Soo Leot* [1956] MLJ 54 dan *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 dirujuk.

(5) Secara alternatif, jika SP3 sememangnya rakan sejenayah, s 114(b) Akta Keterangan 1950 akan menimbulkan satu andaian yang boleh dipatahkan bahawa keterangannya tidak wajar dipercayai kecuali butiran-butiran penting disokong. Dalam kes semasa. Keterangan saksi pihak pendakwaan dan ekshibit-ekshibit yang ditenderkan mengaitkan tertuduh dengan jenayah tersebut. Oleh demikian terdapat sokongan yang mencukupi dalam keterangan SP3 (lihat perenggan 56–57 & 76); *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71; *Haji Ismail bin Mat Sa'at v Public Prosecutor* [1955] 1 MLJ 94 dan *Chua Sin Teng & Ors v Public Prosecutor* [1963] MLJ 150 dirujuk; *Lee Choh Pet & Ors v Public Prosecutor (No 2)* [1972] 1 MLJ 187 dan *R v Baskerville* [1916] 2 KB 658 diikut.

(6) Sekiranya hakim Mahkamah Tinggi terkhilaf dalam penemuan alternatifnya bahawa SP3 adalah rakan sejenayah yang memerlukan keterangannya disokong, hakim akan memberi amaran kepada dirinya tentang bahaya keterangan SP3 yang tidak disokong. Di sini, hakim yakin dengan kebolehpercayaan SP3 dan kebenaran keterangannya yang telah melalui pemeriksaan balas yang teliti. Keterangannya tidak berubah dan konsisten dengan keterangan lain yang dikemukakan dan ekshibit-ekshibit yang ditender oleh pihak pendakwaan. Tiada sebab untuk SP3 berbohong dan hakim tidak mendapati apa-apa alasan yang munasabah untuk menolak keterangannya (lihat perenggan 77).

(7) Kenyataan-kenyataan yang dibuat oleh mangsa kepada bapanya (SP5) dan adik lelakinya (SP11) membentuk 'dying declarations' — adalah relevan dan boleh diterima di bawah s 32(1)(a) Akta Keterangan 1950. Seksyen 32(1)(a) membenarkan penerimaan akuan nazak dalam kes-kes jenayah mahupun sivil, sama ada seseorang itu semasa melafazkannya berada atau tidak berada, pada masa ia dilafazkan, dalam saat menunggu kematian. Di bawah s 32(1)(a) keadaan transaksi yang akhirnya membawa kepada kematian orang yang melafazkannya itu hendaklah mempunyai kaitan rapat dengan kejadian sebenar. Transaksi itu hendaklah berkait dengan satu set fakta-fakta yang berkenaan kematian orang yang melafazkan itu seperti masa atau tempat kematiannya atau tentang pertemuan dengan seseorang yang menyebabkan kematian orang yang melafazkan itu (lihat perenggan 68, 70, 73–74); *Pakala Narayana Swami v King-Emperor* [1939] 8 MLJ 59 dirujuk.

(8) Berhubung pembelaan, adalah jelas kepada Mahkamah Tinggi bahawa tertuduh bertujuan memindahkan tanggungjawab jenayahnya kepada SP3. Keterangan tertuduh juga membentuk penafian semata tanpa bukti lain. Ia tidak berupaya untuk mematahkan les pihak pendakwaan secara munasabah. Oleh itu adalah penemuan spesifik Mahkamah Tinggi bahawa tertuduh gagal membuktikan keraguan munasabah ke atas kes pihak pendakwaan. Hujah alternatif oleh pihak pembelaan berdasarkan ketiadaan mens rea juga tidak bermerit (lihat perenggan 89, 92–94).

(9) Pihak pendakwaan telah membuktikan melampaui keraguan munasabah pertuduhan di bawah s 302 Kanun Keseksaan terhadap tertuduh. Sewajarnya tertuduh disabitkan sedemikian dan dikenakan hukuman mati mandatori (lihat perenggan 95 & 97).

Per curiam/Pemerhatian:

Sokongan mengandungi testimoni berasingan yang mengaitkan, cenderung untuk mengaitkan atau membabitkan tertuduh dengan jenayah. Ujian sokongan adalah sama, sama ada sokongan dikehendaki sebagai suatu perkara amalan di bawah common law atau secara mandatori di bawah statut. Sifat sokongan juga berbeza mengikut keadaan tertentu kesalahan-kesalahan yang dituduh. (lihat perenggan 60); *Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401, ms 418–419 dirujuk dan *R v Baskerville* [1916] 2 KB 658 diikut.]

Notes

For a case on whether witness was an accomplice under criminal procedure, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 16.

For cases on admissibility of dying declaration, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1275–1277.

For cases on evidence of accomplice, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 53–64.
For cases on exception to hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1613–1615.
For cases on nature of corroboration, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 938–942.
For cases on prima facie case, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2945–2957.
For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.
For cases on whether witness was an accomplice under evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 79–84.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (folld)
Balasubramaniam v PP [1997] 2 MLJ 401 (refd)
Bandarupalli Ventakeswarlu [1975] SCC (Cri) 84 (refd)
Bhojraj v Sita Ram AIR 1936 PC 60 (refd)
Chua Sin Teng & Ors v PP [1963] MLJ 150 (refd)
Haji Ismail bin Mat Sa'at v PP [1955] 1 MLJ 94 (refd)
Harcharan Singh & Anor v PP [2005] 1 MLJ 593 (distd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211 (refd)
Lee Choh Pet & Ors v PP (No 2) [1972] 1 MLJ 187 (refd)
Looi Kow Chai & Anor v PP [2003] 2 AMR 89; [2003] 2 MLJ 65 (refd)
(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336 (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379 (refd)
PP v Brahim b Rais [1999] MLJU 305 (refd)
PP v Kenneth Fook Mun Lee (No 2) [2003] 3 MLJ 581; [2003] 5 AMR 265 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Mohamad Fairus bin Omar [1997] 5 MLJ 57 (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393 (folld)
PP v Norazam bin Ibrahim [2006] 3 AMR 524 (refd)
Pakala Narayana Swami v King-Emperor [1939] 8 MLJ 59 (refd)
Pendakwa Raya lwn Soo Tai Leng [2005] 7 MLJ 363 (refd)
R v Baskerville [1916] 2 KB 658 (folld)
Soo Leot, Re [1956] MLJ 54 (refd)
State of Madhya Pradesh v Ram Prasad AIR [1968] SC 881 (refd)
Tan Buck Tee v PP [1961] 1 MLJ 176 (refd)
Teja Singh & Mohamed Nasir v PP [1950] MLJ 71 (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (2), (3), 182A(1), (2), 277
Evidence Act 1950 ss 32(1)(a), 114(b), 133

Penal Code ss 299, 300(a), (b), (c), (d), 302, 304

Roslan bin Mat Nor (Deputy Public Prosecutor, Pejabat Penasihat Undang-Undang Negeri Melaka) for the prosecution.
N Sivananthan (Sivananthan & Co) for the accused.

Low Hop Bing J (now JCA):

THE CHARGE

[1] The accused faces a charge of murder, by causing the death of one Noor Luqman bin Mahayuddin ('the deceased') on 23 June 2003 at about 3am by the side of the road at Batu 7 Bukit Lintang, Tiang Dua in the district of Melaka Tengah, state of Melaka, punishable under s 302 of the Penal Code.

(A reference hereinafter to a section is a reference to that section in the Penal Code, unless otherwise stated).

ESSENTIAL ELEMENTS

[2] Sections 299 and 300 provide for the definition of culpable homicide and murder respectively as follows:

> 299 Culpable homicide
>
> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> 300 Murder
>
> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[3] From the above provisions, it is clear that in order to establish a prima facie case of murder, it is incumbent on the prosecution to prove:

(1) the death of the deceased;

(2) the deceased's death was caused by injury or injuries inflicted on the deceased;

(3) the accused had caused the injury or injuries which resulted in the deceased's death; and

(4) the act causing the death was committed with the mens rea under s 300(a), (b), (c) or (d).

(see also *Public Prosecutor v Brahim b Rais* [1999] 1 LNS 263 per Ian Chin; *Pendakwa Raya lwn Soo Tai Leng* [2005] 7 MLJ 363 per Azahar Mohamed JC (now J); and *Public Prosecutor v Norazam bin Ibrahim* [2006] 3 AMR 524 (HC)).

TRIAL JUDGE'S DUTY AT CLOSE OF PROSECUTION'S CASE

[4] The duty of a judge at the close of prosecution's case in a criminal trial has been set out by Gopal Sri Ram JCA at p 104 lines 36-41; p 107 line 16 to p 109 line 19 in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 AMR 89; [2003] 2 MLJ 65 (CA). A trial judge sitting alone must determine as a trier of fact, whether the prosecution had made out a prima facie case. He must subject the prosecution evidence to maximum evaluation. There is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. This is in line with s 180(1) of the Criminal Procedure Code ('CPC'). This proposition has been affirmed by the Federal Court in two weighty judgments viz *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 per Augustine Paul JCA (now FCJ); and *PP v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 per Gopal Sri Ram JCA.

[5] I shall now embark on a maximum evaluation of the evidence adduced for the prosecution in order to determine whether a prima facie case has been established.

DEATH OF DECEASED

[6] Exhibit P4 shows the body which has been identified by the deceased's father (SP5) and ASP Azman bin Abd Razak (SP17) as that of the deceased. Forensic pathologist Dr Mohamed Azaini bin Ibrahim (SP1) confirmed that the deceased died on 27 June 2003 at 9am. I find as a fact that this element has been proved by the prosecution.

INJURIES INFLICTED ON DECEASED

[7] SP1 produced a post-mortem report (exh P5) on the deceased and testified that the cause of death was severe burns, with external and internal injuries.

He described the external injuries as follows:

> Extensive burn injuries covering approximately 50% of the surface of the body of the deceased. These burn injuries were mostly first degree burn with reddening and swelling of the skin and were seen on the forehead and face, the upper part of the front of the neck and over both shoulders and the upper part of the back. The right side of the chest, both lower limbs (front and back) and the back of the hands also showed first degree burn injuries. Smaller areas of second degree burns were noted over the upper back. Some blisters with red margins were seen proximal to the left wrist

[8] SP1 confirmed that there was no pre-morbid disease process in the deceased's body that could have contributed to the deceased's death at that particular moment in time. The deceased had endured the extensive burn injuries from 23 June 2003 to the date of his death on 27 June 2003. The nexus between the burns and his death remained unbroken.

[9] I find that the prosecution has established this element.

WHO HAS CAUSED THE INJURIES?

[10] Amran bin Daud (SP3) was the eye-witness who gave direct evidence pertaining to the episode from the moment the accused held the deceased hostage in the car, to the moment the accused poured petrol over the deceased, wherein the deceased was set in blazes.

[11] More specifically, the unfolding of the narrative of SP3's evidence will now follow.

[12] On 22 June 2003, at about 10pm, SP3 was together with, among others, the accused in the shop of one Hj Omar, at Kg Seri Minyak, Umbai Melaka, playing the 'Ting Tong' game. The accused left on a Modenas motorcycle bearing registration No MAR 1307. Some 20 minutes later, SP3 received a telephone call from the accused requesting him to go to the Umbai Esso petrol station ('the Umbai Esso station').

[13] SP3 proceeded to the Umbai Esso station on another motorcycle bearing registration No MAV 7993 and met the accused there. The accused parked his motorcycle at that station, and persuaded SP3 to carry him (the accused) as pillion rider.

[14] They proceeded to Jalan Mata Kuching where the accused made a call via a public telephone in front of the KFC building.

[15] The accused then took over the motorcycle with SP3 as pillion rider. They proceeded to the Mobil petrol station at Jalan Mata Kuching ('the Mobil station') where the accused made another telephone call.

[16] From the Mobil station, the accused with SP3 as pillion rider proceeded to the Hang Tuah Mall taxi station where the accused stopped at a public telephone booth behind the Melaka Ocean Supermarket and made a third call, using abusive language.

[17] Then, the accused with SP3 as pillion rider proceeded to Jalan Mata Kuching.

[18] At about 12.45am on 23 June 2003, they arrived near the house of one Farrah (SP2) who was the accused's ex-girlfriend. About 30 feet away, the accused and SP3 saw SP2 alighting from a Proton Iswara car in which the deceased was the driver. The accused told SP3 'itu dia' ('It's her').

[19] Then, the accused with SP3 as pillion rider trailed the car. On arrival at the traffic light at the junction of the 24-hour mini market near the Straits Meridian Hotel, the accused who was riding on the motorcycle moved towards the car.

[20] The accused then stopped the motorcycle. However, when he suddenly saw a police patrol car there, he decided not to alight from the motorcycle.

[21] The accused continued to trail the car to the traffic light at the junction of Jalan Tun Fatimah by the side of a stadium, where he stopped the motorcycle on the left side of the car in which the deceased was the driver.

[22] Armed with a 'sabit' (sickle), the accused alighted from the motorcycle and then asked SP3 to take care of the motorcycle.

[23] The accused then entered the car driven by the deceased and took the front passenger's seat next to the deceased.

[24] Riding on the motorcycle, SP3 trailed the car to the Bukit Katil BP petrol station ('the Bukit Katil BP station') where the accused alighted from the car and gave SP3 RM5 to buy petrol.

[25] As the Bukit Katil BP station was closed, the accused asked SP3 to buy petrol at the Semabok Esso petrol station ('the Semabok Esso station').

[26] Both the accused and SP3 then proceeded to the Semabok Esso station, where SP3 bought RM2 petrol, using a Coca-Cola bottle found there. SP3 thought the petrol was to be used as spare petrol for the motorcycle.

[27] Subsequently, the accused took the petrol from SP3. SP3 had no idea of what the accused had intended to do with the petrol.

[28] From the Semabok Esso station, the accused took SP3 to Jalan Bukit Katil/Duyong, where near an abandoned house they parked the motorcycle behind the car in which the deceased was the driver. The accused then took the ignition key of the car, opened the boot and found a red polka-dotted female scarf (exh P16A). The accused directed the deceased to move to the front passenger seat of the car. The accused asked SP3 to follow on the motorcycle.

[29] The accused then drove the car to the Bukit Katil BP station where he asked SP3 to park the motorcycle, get into the car, together with the petrol in the bottle and sit behind the front passenger seat. SP3 was unaware of the accused's intention.

[30] At about 2am on 23 June 2003, the accused drove the car, with the deceased and SP3 as passengers, to the Jalan Mata Kuching Shell station near SP2's house. The accused asked the deceased about the duration of time the deceased and SP2 had been together i.e. from the time they went out to the time they returned. The deceased responded that they went out at 11.30pm and returned when SP2's mother called.

[31] The accused then took possession of the deceased's mobile phone, and drove SP3 and the deceased to the Bukit Katil BP station, via a housing estate and Jalan Peringgit.

[32] On arrival at the Bukit Katil BP station, as directed by the accused, SP3 alighted from the car, took the petrol to his motorcycle, and followed the car to Jalan Paya Dalam where the accused stopped the car. The accused asked SP3 for the petrol and directed the deceased to take the driver's seat, facing

A the steering. The accused tied the deceased's hands to the steering, by using the scarf. The accused then poured the petrol over the deceased in the car, opened the boot from which the accused took a piece of newspaper and lighted it. The accused threw the burning newspaper at the deceased. SP3 who was sitting on the motorcycle witnessed the entire incident.

B

[33] The accused then asked SP3 to leave the scene. SP3 took the motorcycle with the accused as pillion rider. As they were proceeding towards the Umbai Esso station, the accused told SP3 'habis tangan aku terbakar dan jangan beritahu sesiapa pun' (roughly translated 'I have done the burning job
C and don't tell anyone about it').

[34] On arrival at the Umbai Esso station, the accused, with his sickle, alighted from the motorcycle. SP3 then went home.

D

[35] On the above maximum evaluation of the evidence adduced by the prosecution, I find that it was the accused who had poured the petrol on the deceased and used the burning newspaper to set the accused ablaze, thereby causing the extensive burn injuries to the deceased who died as a result.
E Hence, the prosecution has proved this element.

INTENTION

[36] Under s 299 as alluded to above, culpable homicide is committed by
F a person doing an act:

(1) with the intention of causing:

(a) death;

G (b) such bodily injury as is likely to cause death; or

(2) with the knowledge that he is likely by such act to cause death.

[37] The culpable homicide under s 299 will come within the offence of
H murder in one of the circumstances contained in s 300(a) to (d). The mens rea for the offence of murder is the intention or knowledge prescribed in s 299 read with s 300.

[38] Mens rea in the sense of intention or knowledge being a mental
I element is not capable of being established by way of direct evidence. It has to be gathered by way of indirect evidence, taking into consideration all the facts and circumstances prevailing in each particular case. In this regard, the accused's intention of causing bodily injury to the deceased may be gathered from the accused's act or acts.

[39] Thomson CJ (later LP) in delivering the judgment of the Court of Appeal in *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176 (CA) considered the question of criminal intention set out in ss 299 and 300. His Lordship, at p 178G right column to p 179A left column, explained with unrivalled clarity as follows:

> In all cases of homicide the question of the intention of the accused person in doing the act which is the cause of death, supposing such act is made out by the evidence, is of fundamental importance. In all cases that intention is something the existence and the nature of which are to be deduced from the evidence. In some cases the evidence may be such that it becomes necessary to consider with very great care whether or not the intention with which the act was done does or does not come within the definition of criminal intention set out in s 299 of the Code as being necessary to make the act out to be culpable homicide and whether it does or does not come within the definition of criminal intention set out in s 300 as being necessary to make the act out to be murder. In such cases it is necessary for the judge to spell out with the greatest possible care such portions of ss 299 and 300 as may be appropriate.

[40] Although the learned Chief Justice was delivering the judgment of the Court of Appeal in an appeal from a decision in a trial by a judge and jury, the above observation is in my view equally applicable to a trial before a judge without a jury, as is the case before me (see also *PP v Norazam bin Ibrahim*).

[41] In this regard, I shall set out with the greatest possible care the accused's intention by referring to the accused's acts of:

(1) asking SP3 to buy petrol;

(2) carrying a sickle;

(3) forcing the deceased to take over the driver's seat facing the steering, to which the accused had tied the hands of the deceased by using the scarf;

(4) pouring the petrol over the deceased in the car;

(5) taking a newspaper from the boot of the car, lighting and throwing it at the deceased in order to set the deceased ablaze in the car; and

(6) refusing to douse the blazes caused by him.

[42] The accused had acted with complete callousness towards the results. The risk he had taken was such that he knew the ultimate effect of his acts are so imminently dangerous and must in all probability cause death, or such bodily injury as is likely to cause death. The accused has committed such acts without any excuse for incurring the risk of causing death or such injury as aforesaid. The accused's acts are necessarily fatal and carry knowledge of the consequences (see *State of Madhya Pradesh v Ram Prasad* AIR [1968] SC 881;

and *PP v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah (No 2)* [2003] 3 MLJ 581; [2003] 5 AMR 265, p 291 per Augustine Paul J (now FCJ)).

[43] The fact that the accused's ex-girlfriend SP2 has found a new male companion (ie the deceased) and her refusal to see the accused thereafter does not allow the accused to set the deceased ablaze.

[44] The accused's acts were done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

[45] In *Bandarupalli Ventakeswarlu* [1975] SCC (Cri) 84, a young boy had allegedly stolen some brass vessels belonging to the appellant and others. Having been enraged, they tied him up. After one of the accused poured kerosene over the boy, the appellant set fire to his clothes. The appellant's attempt to put out the fire was held not to have negatived his intention to cause the boy's death (see *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed, 1998) at p 1296 para (f)).

[46] Reverting to the mainstream of the facts which I specifically find herein, I am of the view that the prosecution has established the necessary mens rea ie the intention prescribed in s 300(a), (b) or (c) or the knowledge contained in s 300(d).

ACCOMPLICE

[47] Learned defence counsel Mr N Sivanathan took the view that SP3 was an accomplice because he 'had been positively involved in the alleged commission of the criminal acts and he ought to have prior knowledge of the commission thereof, despite his contention of innocence and denials'. Support was sought in *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593 (CA).

[48] It was contended by the prosecution that SP3 was not an accomplice as he had neither participated in the commission of the crime nor had prior knowledge of the accused's intention to commit it, relying on *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 (FC).

[49] At this juncture, it is necessary for me to determine this issue of whether SP3 is an accomplice. For this purpose, I shall examine the relevant governing principles as follows:

(1) In Malaysia, it has been accepted that an accomplice is a person who has participated in the commission of an offence. He is a *participes criminis*: per Augustine Paul JCA (now FCJ) in *Harcharan Singh*, at p 600 A-C citing *Re Soo Leot*; *Kuan Ted Fatt*, and *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336; and

(2) Where he had played an active role, his evidence must be corroborated. On the other hand, if his role has been passive, his evidence may be accepted with the usual corroboration warning (see *Harcharan Singh*, per Augustine Paul JCA (now FCJ) p 601 para 7).

[50] On the issue of whether PW9 in *Harcharan Singh* was an accomplice, his relevant role was considered. He helped to loosen the rope around the deceased's neck. He helped to carry the body of the deceased to the boot of the car. When the car was driven off, he sat as a passenger in the front seat. When the car stopped, PW9 and the second accused carried the deceased's body and dumped it. After that, he did not mention his acts to anyone. The Court of Appeal held that the role played by PW9 was not passive. He was an active accessory after the fact. Hence his evidence was no better than that of an accomplice.

[51] It is abundantly clear to me that the particular facts and circumstances of each case would play a pivotal part in resolving the issue of whether a witness is an accomplice.

[52] In the instant case, prosecution's evidence revealed that:

(1) It was the accused and not SP3 who poured the petrol over the deceased in the car. SP3 played no active role in this act of the accused;

(2) The accused had asked SP3 to meet the accused in the Umbai Esso station and SP3 had no idea as to the intention of the accused;

(3) The accused asked SP3 to buy the petrol which SP3 thought was meant for the motorcycle;

(4) SP3 did not make a police report as the accused had told SP3 not to tell anyone about the episode;

(5) SP3 did not participate in the accused's act of tying the hands of the accused to the steering of the car; and

(6) The accused had asked SP3 to follow him.

[53] On the facts and circumstances established in the prosecution's case, I find that SP3's acts are readily distinguishable from the active role played by PW9 in *Harcharan Singh*. In my judgment, SP3 is not an accessory after the fact. So, he is not a *participes criminis* and is not in law an accomplice.

SP3 cannot be put on the same footing as PW9 in *Harcharan Singh*. I will therefore deal with SP3's evidence as that of an ordinary witness, requiring no corroboration.

ALTERNATIVE FINDING

[54] Be that as it may, in the event that I have erred in my finding that SP3 was not in law an accomplice, it is fitting and proper for me to consider the finding in the alternative ie that SP3 was an accomplice. This alternative finding is permissible and there is nothing objectionable, as clearly explained by Spenser Wilkinson J in *Teja Singh & Mohamed Nasir v PP* [1950] MLJ 71 in the following words:

> I can see nothing wrong in a court finding, as a matter of law, that a witness is not an accomplice and then going on to indicate what its finding would be in case it should be held that this matter of law has been wrongly decided.

[55] This view was followed and applied in *Haji Ismail bin Mat Sa'at v PP* [1955] 1 MLJ 94 (CA); *Chua Sin Teng & Ors v PP* [1963] MLJ 150 (HC); and *Lee Choh Pet & Ors v PP (No 2)* [1972] 1 MLJ 187.

[56] Now, in treating SP3 as an accomplice, it is necessary for me to invoke s 114(b) and s 133 of the Evidence Act 1950.

[57] Section 114(b) provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

[58] Under s 133, an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[59] I am of the view that s 114(b) raises a rebuttable presumption that the evidence of SP3 as an accomplice is unworthy of credit unless it is corroborated in material particulars.

[60] The locus classicus of the requirements for corroboration of the evidence of an accomplice is to be found in *R v Baskerville* [1916] 2 KB 658, where the relevant portion of the judgment of the Court of Criminal Appeal was delivered by Lord Reading CJ. The principles that may be culled therefrom are:

(1) Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the

crime; it must be evidence which implicates him i.e. which confirms in some material particular not only the evidence that the crime has been committed, but also that the accused committed it;

(2) The test applicable to determine the nature and extent of the corroboration is the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute; and

(3) The nature of corroboration will necessarily vary according to the particular circumstances of the offences charged (see also *Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401, pp 418–419 (SC)).

[61] The crucial question which I have now to ask is whether or not there was any independent evidence, direct or circumstantial, to connect or tending to connect the accused with the crime of murdering the deceased ie by:

(1) using the scarf to tie the hands of the deceased to the steering of the car;

(2) pouring the petrol over the deceased in the car;

(3) lighting a newspaper to set ablaze the deceased in the car; and

(4) failing to put off the blazes.

[62] In this regard, further analysis of the evidence adduced by the prosecution would certainly throw some light and enable me to make the necessary finding (see *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 (FC) per Salleh Abas CJ (M) (later LP).

[63] SP3's evidence that the accused had used the scarf to tie the hands of the deceased to the steering of the car is corroborated by the production of the scarf itself.

[64] There was evidence from the victim's mother Puan Ummidallia bte Zakaria (SP14) that the scarf belonged to her and was placed by her in the car bearing registration No WHB 5824 two weeks before the incident and it was used by the accused to tie the hands of the deceased. The deceased had used that car to fetch his girlfriend SP2 on the night in question.

[65] SP13, the owner of the motorcycle bearing registration No MAV 7993, confirmed SP3's evidence that this motorcycle was on the night in question ridden by the accused with SP3 as pillion rider. That was seen by SP2 in front of her house. The motorcycle was indeed trailing the deceased's car.

[66] One Shukor bin Talib, SP4, testified that he saw the car in blazes by the side of the road along Jalan Tiang Dua, while corporal Sajaee, SP6, who received the first information report lodged by victim's father (SP5) confirmed that the hands of the accused were tied to the steering of the car and the registration number of the motorcycle was MAV 7993.

[67] In addition to the scarf, the prosecution tendered the T-shirt exh P13A worn by the deceased, and the registration plate exh P18A of the car driven by the deceased at the material time. These are consistent with the evidence of SP3.

[68] SP5, the deceased's father gave evidence that, in the intensive care unit of the Melaka Hospital, the deceased had told SP5 that the deceased 'kena samun di traffic light Semabok'; and 'lepas itu dibawa ke Bukit Lintang.' ('had been robbed at the Semabok traffic light' and 'taken to Bukit Lintang'). SP5 also testified that the deceased had informed him of the registration number of the accused's motorcycle as MAV 7993. This statement by the deceased is a relevant fact in the category of a dying declaration which attracts the application of s 32(1)(a) of the Evidence Act 1950 ('s 32(1)(a)').

[69] Section 32(1)(a) merits reproduction as follows:

> Statements by persons who cannot be called as witnesses
>
> 32. Cases in which statement of relevant fact by person who is dead ….., etc., is relevant.
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead ……, are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

[70] Section 32(1)(a) also applies to what the deceased had told his younger brother SP11. Before the deceased's death, he told SP11 that he ie the deceased 'telah disamun dan seterusnya orang itu masuk ke dalam kereta' and 'orang itu bawa kereta ke Bukit Lintang, lalu dibakar', ie the deceased 'had been robbed and the other person had entered the deceased's car and driven the car to Bukit Lintang, then set ablaze'. That person was identified as the accused. This was clearly stated in the contemporaneous police report Kandang Report No 1324/03 (exh P11) lodged by SP11. This evidence of SP11 is consistent with that of SP3.

[71] As a general rule, the law of evidence requires the best evidence to be adduced. Exceptions do arise in order to allow the admissibility of hearsay evidence: see eg *Public Prosecutor v Mohamad Fairus bin Omar* [1997] 5 MLJ 57 (HC). (p 303, *Evidence, Practice and Procedure*, 2000 by Augustine Paul (now FCJ)).

[72] The rationale for admitting a dying declaration is that 'where a witness is dead, it may be better to admit evidence of what he said than to deprive the court of all proof" (*Phipson on Evidence* (13th Ed) p 345).

[73] Section 32(1)(a) allows the admissibility of a dying declaration in criminal as well as civil cases, as expressly stated under the terms 'whatever may be the nature of the proceeding in which the cause of death comes into question'. A dying declaration under s 32(1)(a) is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death (*Sarkar's Law of Evidence*, Vol 1, p 567).

[74] Under s 32(1)(a), the maker of a statement who is dead and the statement in the form of a dying declaration as to the cause of his death or circumstances of the transaction which resulted in his death are relevant and admissible. The circumstances must have some proximate relation to the actual occurrence. The transaction must relate to a set of facts pertaining to the death of the victim such as the time or place of his death or about meeting someone who may be the accused: per Lord Atkin in *Pakala Narayana Swami v King-Emperor* [1939] 8 MLJ 59.

[75] Having regard to s 32(1)(a) and the above principles, I hold that the above statements made by the deceased to his father SP5 and his brother are relevant and therefore admissible under s 32(1)(a).

[76] I am of the further view that the evidence of SP2, 4, 5, 6, 11, 13 and 14 and the exhibits tendered by the prosecution through them do connect or tend to connect the accused with the crime. There is therefore sufficient corroboration of SP3's evidence.

WARNING ON UNCORROBORATED EVIDENCE

[77] However, in the event that I have also erred in this alternative finding, I am acutely aware of and do hereby warn myself of the danger of acting on the uncorroborated evidence of SP3. In this regard, I have given SP3's evidence my utmost consideration and am convinced of his credibility and the truth of his evidence which has undergone incisive cross-examination. There is no reason for him to tell lies in court. I am unable to find any plausible ground to reject his evidence.

[78] In *Bhojraj v Sita Ram* AIR 1936 PC 60, the Privy Council advised that the real tests for either accepting or rejecting evidence are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.

[79] The inherent probability or improbability of a fact is the prime consideration in testing the credibility of a witness: per Ong Hock Thye FJ in *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, p 258 left column.

[80] In relation to the instant appeal, I am of the view that notwithstanding the incisive cross-examination for three days, it is my specific finding that SP3's evidence has remained unscathed and is consistent with all the exhibits tendered through various prosecution witnesses as well as their evidence. His evidence is certainly not a figment of his own imagination.

PROCEDURE AFTER CONCLUSION OF PROSECUTION'S CASE

[81] The procedure after conclusion of the prosecution's case is contained in s 180(1), (2) and (3) of the CPC expressed in the following words:

> 180 Procedure after conclusion of case for prosecution
>
> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a prima facie case has been made our against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[82] Hence, when the prosecution has concluded its case, it is incumbent on me at this stage to consider whether the prosecution has made out a prima facie case against the accused (see *PP v Norazam bin Ibrahim*).

[83] On the above finding of facts and the application of the law, pursuant to s 180(1) and (3) of the CPC as explained by the Court of Appeal in *Looi Kow Chai*, I am of the view that the prosecution has established a prima facie

case for the accused to answer. I therefore call upon the accused to enter his defence. Upon the three alternatives being explained to him, he elected to give evidence on oath.

DEFENCE CASE

[84] The accused was the only witness in the defence case. In his evidence, the accused admitted playing a role in this crime, by entering into the deceased's car at the traffic light and taking him to the crime scene. He testified that he was instructed by SP3 to 'takutkan lelaki itu' ('frighten that man'), and that he (the accused) had acted foolishly to comply with SP3's instructions, in his term as 'sahabat karib' ie 'close friend'. The accused denied any role in setting the deceased ablaze in the car. The accused said that SP3 had poured the petrol inside and outside the car in order to "takutkan" (frighten) the deceased. However, things had gone wrong when SP3 lit a piece of paper and flung it towards the roof of the car as SP3 did not realize there was petrol on the roof of the car thereby causing the loss of a life.

[85] On the aforesaid evidence, it is the defence submission that:

1 the accused has raised a reasonable doubt in the prosecution's case as his evidence is reasonably true or consistent with his innocence;

2 the accused is a more reliable witness than SP3 whose evidence was for self-preservation;

3 the accused was too naïve or rather stupid to tell SP3 not to divulge to anybody about this incident; and

4 the accused has unveiled the real perpetrator in this horrendous crime.

[86] Alternatively, it was contended that there was no intention on the part of the accused to commit murder and so the charge should be reduced to s 304 of the Penal Code instead of the above charge under s 302 thereof.

[87] On the other hand, the prosecution stressed that at the close of the defence case, the prosecution has succeeded in proving the charge of s 302 beyond reasonable doubt against the accused.

[88] In this regard, the prosecution also pointed out that the accused has failed to cast a reasonable doubt in the prosecution's case.

[89] It is abundantly clear to me that the accused sought to shift his criminal responsibility to SP3. The accused's evidence must be examined in the light of the fact that it was the accused who had first left his friends including SP3 in their 'Ting Tong' game at the material time. The accused

had subsequently asked SP3 to follow him on the night in question although SP3 was still enjoying his 'Ting Tong' game.

[90] SP3 had no emotional attachment or relationship with SP2, the accused's ex-girlfriend, who had become the deceased's girlfriend at the material time. I am unable to see any plausible reason for SP3 to 'takutkan dia' (to frighten the deceased), less so for SP3 to react by pouring petrol over the deceased, to set the deceased ablaze in the car, and to cause the death of the deceased.

[91] It was the accused who had an axe to grind against the deceased, as the accused had admitted under cross-examination that he was furious with SP2 for becoming the girlfriend of the deceased. The accused's fury has consequently permeated to the deceased as well.

[92] Apart from shifting his criminal responsibility to SP3, the accused's evidence is a bare denial without any other proof. It has not reasonably dislodged the prosecution's case. A bare denial is not sufficient: see eg *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 (HC) per Yusoff Mohamed J (later SCJ) at p 326 right column A.

[93] After weighing the entire evidence adduced for both the prosecution and the defence, it is my specific finding that the accused has failed to cast a reasonable doubt on the prosecution's case.

[94] In the light of my earlier finding in relation to the accused's mens rea or intention, which I hereby adopt, I am also of the view that the defence alternative submission based on the absence of mens rea is devoid of merits.

PROOF BEYOND REASONABLE DOUBT

[95] On the foregoing grounds, pursuant to s 182A(1) of the CPC it is my specific finding that at the conclusion of the trial, the prosecution has proved beyond reasonable doubt the charge under s 302 against the accused, and so in accordance with s 182A(2), I find the accused guilty of the offence as charged and record a conviction against him (see also *Balachandran*).

SENTENCE

[96] Parliament has in its wisdom provided for and prescribed only one mandatory sentence under s 302 in the following words:

> 302 Punishsment for murder
>
> Whoever commits murder shall be punished with death.

[97] I am left with no other alternative but to impose the sentence of death on the accused which I hereby do.

[98] In accordance with s 277 of the CPC and consistent with the intention of Parliament, I direct that the accused be hanged by the neck till he is dead.

Accused convicted as charged and sentenced to death.

Reported by Andrew Christopher Simon